SUPREME COURT, U. S.
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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1969

B. F. DIAMOND CONSTRUCTION COMPANY, INC., AND DIAMOND MANUFACTURING COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL RELATIONS BOARD IN OPPOSITION

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CITATIONS

Case:

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 9
Section 8(a)(5) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A - 1-2) is not yet officially reported. The Board's decision and order are reported at 163 NLRB No. 25.

JURISDICTION

The judgment of the court of appeals (Pet. App. A - 3) was entered on May 12, 1969, and petitioners' timely petition for rehearing (Pet. App. A - 4) was

denied on June 4, 1969. The petition for a writ of certiorari was filed on July 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioners failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set out at page 3 of the petition.

STATEMENT

A. The Board's Findings of Fact

Following the Union's [1] certification on July 1, 1965, as representative of the marine employees aboard the Company's [2] tugboats and work boats, the Union and the Company held 17 meetings for the purpose of negotiating a collective bargaining agreement. At the initial session on July 30, the Union

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[1] Associated Maritime Workers Local No. 8, affiliated with the International Organization of Masters, Mates, and Pilots, AFL-CIO.

[2] B. F. Diamond Construction Co., Inc., and Diamond Mfg. Co., Inc., petitioners, are Georgia corporations operated as a single integrated business enterprise.

presented a standard contract proposal to be used as a guide to negotiations, and agreement was reached on the preamble and recognition clauses and layoffs and grievances sections (R. 38-40; J.A. 17-18, 21-23, 26-28, 108-109, 114-116, 374, 414, 491-492, 498).[3] During the meeting, Union president Scott requested information concerning wages, rates of pay, hospitalization, insurance, bonuses and other terms and conditions of employment then in effect for employees in the unit (R. 37-38; J.A. 14-17, 110, 114-116, 267-268, 362-364, 366-367, 374-375, 377-378, 462-464). Company superintendent Crumrine replied that it was against Company policy to divulge this information, and suggested that the Union obtain the information from the employees (R. 38; J.A. 15-18, 111-113, 263-264, 454, 462). When Crumrine was asked how long he thought it would take to reach an agreement, he replied, "The law only requires that Companies negotiate. It doesn't require the Companies to reach an agreement, and we only propose to go as far as the law requires." He added, "We've been negotiating with another union three or four years and we are still negotiating. Guide yourself accordingly" (R. 42; J.A. 33-35, 224-225, 359-360, 389-390).

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[3] "R." refers to the Transcript of Record in the court below which is included in Volume III of the certified record herein; "J.A." refers to the Joint Appendix in the court below which is included in Volumes I and II of the certified record herein. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The parties met again on September 10 and 11.[4] They considered the Union's proposal based on the previous discussions and initialed the sections upon which agreement was reached.[5] (R. 49-50; J.A. 48-74, 391-392, 424-425). The Union requested information relevant to cost items that it wished to negotiate, but its request was again denied (R. 50-51; J.A. 596). No new agreements were reached at the September 11 meeting, which adjourned at 2 p.m. because company negotiators had to leave. Following lunch on September 11, Crumrine invited Scott and Union treasurer Hicks for a drink. When Scott expressed the hope during the conversation that agreement could be reached by the first of the year, Crumrine replied: "Scott, don't be naive. The Companies don't intend to ever sign an agreement with your Union" (R. 51-52; J.A. 368-370, 78-80, 270-271).

On September 15 the Company cancelled the meeting scheduled for the following day but promised to

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[4] At an intervening meeting on August 10, Crumrine attempted to reopen discussion of the recognition clause previously agreed to and sought an early adjournment of the meeting because he had to leave on a business trip (R. 43; J.A. 34-45). Crumrine said he would call the Union on August 20 to arrange the next meeting, but he failed to do so and did not return Scott's telephone calls. Scott finally reached Company vice-president Stuber on August 25 and arranged meetings for September 10 and 11. (R. 48-49; J.A. 46-47, 227-232, 594-595.)

[5] Although Union treasurer Hicks had been under the impression that agreement had been reached on several sections at the previous meeting, the Board found that on July 30, the parties had reached agreement only on preamble, recognition, layoffs and grievance handling (see p. 3, *supra*; R. 39-40, 44-48).

propose a substitute date (R. 52-53; J.A. 77, 232-233). Having heard nothing by September 28, Scott called Company vice-president Stuber who said he had no time for a meeting, adding, "I can't give you any commitment whether we will ever meet again." When Scott stated that it appeared Stuber was stalling, Stuber responded, "You and I both know what is going on" (R. 53-54; J.A. 233-235). At Stuber's suggestion, Scott sent a letter requesting a meeting and reiterating the Union's previous requests for information concerning various cost items (R. 54; J.A. 596-597, 237-238, 364).

At the next meeting on October 7, Stuber told Hicks that, before negotiating further, he wanted the Union to prepare a new contract proposal setting forth all of the Union's demands. Hicks protested that the purpose of the meeting was to negotiate the remaining sections of the standard contract and complained that Stuber had waited until the meeting to request a new proposal. Stuber said he "couldn't help that" but that if the Union would submit a proposal by October 13, the Company would accept or reject it on October 20 (R. 55-56; J.A. 84-87, 144-145). Hicks agreed to submit a new proposal with the understanding that it would not jeopardize sections previously agreed to by Crumrine (R. 57; J.A. 87). When Hicks again requested information with respect to the hours, rates of pay, and working conditions of employees in the unit, Stuber flatly refused to furnish the information, telling Hicks to get it from the employees (R. 55-56; J.A. 83-84, 144-145, 129-134). In response to Hicks' request for

information concerning hospitalization insurance, Stuber said that the Company would supply it. The Company, however, refused to give the information to Hicks in time to utilize it in preparation of the new proposal requested by the Company (R. 56-57; J.A. 92-93, 145-146, 84-86, 130-132).

The parties met on October 20 to discuss the new proposal submitted by the Union. With respect to each section covering cost items—*e.g.*, days and hours of work, wages, overtime, minimum manning level, and sick leave—the Company counterproposed that existing conditions be continued without change (R. 59; J.A. 152-158, 161-167, 170-177, 447, 479). But when the Union suggested a provision affirming the continuation of existing seniority policy, Stuber rejected it, stating that the men knew what it was and the Company would not change it (R. 60-61; J.A. 158-159, 541, 167-168, 303, 544-555, 546-547, 176-177). Scott pressed for further discussion of a proposed new wage scale and a reduction in hours, but Stuber asked to put off the matter until November 19. When Scott protested that the delay was unreasonable, Stuber agreed to meet on November 10.

At the November 10 meeting, Stuber indicated that the Company's wage proposal was unchanged "at this time." Scott asked Stuber for the Company's current policy, in writing, relating to the cost provisions of the proposed contract (R. 65-66; J.A. 202-206, 268-269, 573-574). Although this request was subsequently met in part, some of the information sought was incomplete and some of it was never produced (R. 67-68; J.A. 278-291). No further progress was made at this meeting.

A special employees' committee attended the next meeting, on December 3, for the purpose of learning what progress had been made (R. 70; J.A. 397-398). Stuber reaffirmed the Company's position, adding that the Company had a voluntary method of raising wages and did not need a union to negotiate them, and that he thought higher wages might be forthcoming under other conditions (R. 70; J.A. 398-401, 415-416). After reviewing the several provisions, Stuber commented that they provided nothing that the men did not already have, noting specifically that the provision of the "Dockside Work" section had been in effect for 15 years. When Hart, an employee member of the Union's negotiating team, thereupon asked if it were the Company's position that it would do nothing it had not done for 15 years, Stuber responded, "I'm glad you are getting the point" (R. 70; J.A. 401-402).

No progress was made at the next meeting on January 6, 1967 (R. 71-72; J.A. 289-290, 292-295, 322, 617, 326). Following this meeting, the Union, on January 17, filed charges with the Board's Regional Office that the Company had refused to bargain in good faith (R. 72).

At the meeting on January 21, the Union pointed out that the Company's "strikes" proposal, which barred any form of work stoppage and allowed the Company to terminate the agreement if the Union did not return striking employees to work within 24 hours, was unreasonable because any group of dissident employees could defy the Union and give the Company the right to terminate the agreement (R.

60, 73; J.A. 316-317, 442-447, 617). Stuber suggested a modification which Scott took under advisement (R. 73-74; J.A. 318-319). At the next meeting, on February 3, Scott offered to accept the modification, but Stuber then stated that the modification had merely been discussed, not offered, and that the Company's proposal remained as originally presented on October 20. Scott offered another modification which Stuber took under advisement and rejected at the following meeting, on February 17 (R. 75-76; J.A. 319-322).[6] When asked at this meeting whether he would make any better offer at all with respect to cost items, Stuber replied that the Company would not change its position, but that perhaps the employees might wish to change their representative (R. 76; J.A. 432-433, 482).

The parties met again on March 10 and 30 and on April 14. At the April 14 meeting, the Company deviated from its initial position that a seniority provision was unnecessary since the existing practice would remain in effect (R. 61; J.A. 167-168, 303, 544, 555). The Company proposed a seniority provision which the Union regarded as being more stringent than the Company's current practice and as modify-

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[6] A meeting that had been scheduled for February 4 was cancelled by Stuber on grounds that the parties were making no progress and therefore had no need for a meeting the following day (R. 75; J.A. 240). Following the February 17 meeting, Scott requested that the parties next meet on February 28, and reiterated his request for daily meetings thereafter. Stuber replied that he would meet on March 3 if the Union withdrew the unfair labor practice charges which it had filed (R. 77-78; J.A. 243-246, 248-250, 426-428).

ing provisions which already had been agreed upon (R. 80-81; J.A. 615-616, 382-386, 303-306, 390-396). On April 28, the final meeting before the unfair labor practice hearing, Scott asked Stuber if he would delete all references to seniority, as the Company had originally proposed. Stuber replied that the Company's April 14 proposal was the only proposal on the table, but he would take the Union's objections under advisement (R. 82-83; J.A. 306-307, 373-374, 390-396).

B. The Board's Conclusion and Order

The Board found, on the basis of the Company's entire course of conduct summarized above and set forth more fully in the Trial Examiner's decision (J.A. 32-83), that the Company had failed to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act (J.A. 109-110, 128). In reaching this conclusion the Board relied, *inter alia*, on the Company's dilatory tactics and refusal to meet with the Union at reasonable times; its refusal to furnish, or unreasonable delay in furnishing, to the Union data relevant to the subjects of bargaining; its abrupt and unexplained shifts in position with respect to proposals which it previously accepted; and its evident intention to stall and not to reach agreement with the Union. The Board ordered the Company to cease and desist from the unfair labor practices found and to bargain with the Union, upon request (R. 110-111, 129).

C. The Decision of the Court of Appeals

In a *per curiam* opinion, the court of appeals "conclude[d] without difficulty" after a "thorough examination of the record" that the Board's findings are supported by substantial evidence on the record as a whole (Pet. A-2) and enforced the Board's order in full (Pet. A-1, A-2).

ARGUMENT

The Company's challenge to the Board's unfair labor practice findings raises only factual issues which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In all events, the facts summarized in the Statement show that the court below was amply warranted in ruling that the Board's findings and conclusions are adequately supported by the record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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